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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78, 123

WILLIE C. ACKER,

Appellant.

VERSUS

BOARD OF TRUSTEES OF
PASS CHRISTIAN MUNICIPAL
SEPARATE SCHOOL DISTRICT.

Respondents.

On Appeal From the Supreme Court of Mississippi

MOTION OF APPELLEE TO DISMISS APPEAL

W. JOEL BLASS
Mize, Thompson & Blass
Post Office Box 160
Gulfport, Mississippi 39501

ATTORNEY FOR APPELLEE

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Comes now the Appellee and moves that this appeal be dismissed upon the grounds that no substantial federal question is presented by it. This appeal is taken from a decision of the Supreme Court of Mississippi upon the second appearance of this case before it. Shortly before the end of his contract for the current year, in 1974, the Appellant was notified by his Principal that he would not be recommended for a new contract. He had appealed to the Chancery Court of Harrison County, Mississippi from action of the Board of Trustees, following a hearing, in declining to override the Principal and order his re-employment. The hearing was granted by the

Board under the provisions of the Mississippi Public Schools Fair Dismissal Act (Miss. Code Annotated, Sections 37-9-101 through 37-9-113, 1972) which became effective April 25, 1974. On April 12th, before the effective date of the act, Appellant had requested a hearing which was denied. On April 25, 1974, the new statute became effective and, in the light of the new act, the Board granted Appellant's request for a hearing and set May 21, 1974 for it. Appellant was notified by letter dated May 3, 1974. Upon the appointed date, he appeared through counsel, newly employed that day, and a different attorney from his original counsel, and requested a continuance which the Board granted, setting the new date for June 3, 1974. After the hearing, the Board declined to order his re-employment and he appealed to the Chancery Court of Harrison County, Mississippi, de novo, as the statute then provided. The Chancery Court held that there had been procedural errors under the act and ordered the re-employment of Appellee. From this, the Board of Trustees appealed and the Supreme Court of Mississippi reversed and remanded upon the ground that a de novo hearing before the Chancery Court from the administrative hearing violated the Mississippi concept of separation of powers and that the Chancery Court was limited to determining whether or not the order of the administrative agency was supported by substantial evidence, was arbitrary or capricious, was beyond the power of the administrative agency to make, or violated some statutory or constitutional right of the complaining party. The Chancery Court heard the matter again, within these limits, and affirmed the action of the Board. The Appellant again took the matter to the Supreme Court of Mississippi where it was affirmed on March 8, 1978 and rehearing was denied on April 26, 1978. No opinion was written on either of these last two actions.

I.

THE VALIDITY OF THE STATUTE IS NOT GENUINELY DRAWN INTO QUESTION IN THIS CASE.

Appellant takes the position that the statute was unconstitutional because it did not set out every requisite for due process which the Courts have enunciated. Upon its face and very clearly, the statute requires that "the hearing shall be conducted under rules of the Board which shall embody due process of law and fairness for both parties." There is nothing wrong with the statute and we think that the legislature may be forgiven for simply stating that the hearing shall be fairly held and due process accorded to both parties. If due process has not been accorded, it is not the fault of the statute.

Appellant complains that the statute failed to grant the School Board power, after a hearing, to overrule the Principal's failure to recommend the teacher for a new contract. The Mississippi Supreme Court has since addressed that point and has held that that is not the proper interpretation of the statute. ***Lamar County School Board v. Saul,*** 359 So.2d 350 (Miss. 1978). The statute, as construed by the Mississippi court, is not, therefore, deficient in this respect. Appellant also complains that the statute fails to require a pretermination hearing, but it is clearly not defective on this point for the reason that it is dealing with a question of a failure to renew a contract, rather than the termination of an existing contract, and set in the time frame of the school year, the hearing would normally take place prior to the end of the semester in which the teacher is actually engaged. There would, therefore, be and there has been no interruption of the teacher's employment, even to this very day.

Appellant complains that the statute fails to require the School Boards, after a hearing, to state in a written notice to the teacher the reason for the decisions not to override the

Superintendent or the Principal. While this might be the better practice and perhaps should be done in most cases, the statute certainly is not faulty for not spelling out such a requirement. We fail to see how the Appellant could be harmed, in any event, because the issues were not complicated and the reasons for the Board's action are evident from a reading of the record.

Next the Appellant complains that the statute permits School Boards to hear cases in which the Board members either have a personal interest or some conflict, bias or prejudice. That statement is obviously not true and the language of the act above quoted clearly refutes it. In the same paragraph of his Jurisdictional Statement, the Appellant complains that the act fails to state any measurable standard for renewal of teacher's contracts by which the substantiality of the evidence can be tested, but we know of no requirements that this be set out in the statute, particularly in view of the interpretation the statute has received from the Supreme Court of Mississippi. ***Lamar County School Board v. Saul, supra, Calhoun County Board of Education v. Hamblin,*** 360 So.2d 1236 (Miss. 1978).

The remaining attacks made upon the statute are that it permitted an administrative agency to exercise the judicial function and that it failed to prohibit the attorney for the Principal from serving as counsel for the School Board during the conduct of the hearing. The allegation with regard to the administrative agency exercising the judicial function does not, in our judgment, require an answer. Every administrative agency must, at some times, make decisions which affect individuals under its jurisdiction. If every such decision were taken away from administrative bodies and turned over to the courts, the courts would simply be unable to handle them.

The Appellant further objects that counsel for the Board also represented the Principal of the school at the hearing and argues, for this reason, that the statute is unconstitutional.

The statute does not reach this point and certainly does not require this procedure. The act says that the hearing shall be fair and that due process shall be afforded. The record in this case discloses that counsel for the Principal was scrupulously fair in his behavior at the hearing. It is not possible to find in this record any instance where it could truthfully be said that counsel took any advantage of his position to the injury of the Appellant.

Further, with reference to the dual role of the School Board attorney, Appellant cites several cases, but none of them is in point. The School Board attorney's behavior was so exemplary, the Appellant's attorney was moved to write, in his Brief to the Mississippi Supreme Court that:

> "The Appellant ***does not*** suggest that the Board's attorney acted in any way unethically or unprofessionally. It is submitted, however, that his actions were contrary to the current standards of lawful due process."
> (Emphasis from the original)

However this may be, it is clear that the statute did not require this procedure and this objection does not address itself to the validity of the act.

The remainder of Appellant's attack upon the statute simply complains of various things which are not addressed by the act. On page 32 of his Jurisdictional Statement, Appellant says:

> "The real decision by the School Board was made summarily and secretly on March 24, 1974 (R. 68) long before the hearing."

That statement is false and the whole record shows it. At the time of the action at Record 68, the Board felt that it had no

authority to act, and the merits of the controversy were clearly not before it. The quoted statement is typical of the collection of loose comments which characterize the Jurisdictional Statement. The money now being spent on the refutation of such charges, unsupported by the record, could be better spent on raising teachers' salaries and additional books and supplies to improve the quality of education in Mississippi's schools.

At page 33 of his Jurisdictional Statement, Appellant complains that he was given two additional statements as to reasons for the non-renewal of his contract. He asked for the reasons and they were given to him. This was the first time the law required the reasons to be given. The record makes it amply clear that the reasons were those which prompted the Principal to withhold his recommendation for new employment (R. 19 - 28), and that the "accusation" came from the Principal. There were only four reasons given, all coming from the Principal, and all were amply established by the record; all simple and easy to understand. Again, none of these complaints were caused by any defect in the statute, and an appeal based upon constitutional infirmity in the statute must fail.

Whether or not the foregoing litany of complaints will move the Court to grant certiorari is another question but, at this point, it is appropriate to observe that Appellant, nowhere, shows how he has been damaged or treated unfairly in fact. He uses language like "not advised at all in sufficient detail." "How can one show error when one does not even know the source of the accusation?" An accusation is true or false, or true in part and false in part, regardless of the source, and Appellant was advised in detail as to the reasons which prompted the Principal not to recommend renewal of his contract. (R. 66)

Before going into the next point, we wish to observe that Appellant does not state, anywhere in the Jurisdictional

Statement, that the Board reached an erroneous conclusion; that an impartial Board would have reached a different one; that the evidence presented was not true; that he was denied the right to put on any proof he wanted to introduce; or that he suffered any actual injury in fact. Having no real injury to complain of, he tries very hard to find technical violations of procedural rules, and makes harsh accusations against the Board members, accusing them of bad faith, lying under oath, being biased and prejudiced, having a "stake" in the outcome (not specifying what the "stake" is; (Jurisdictional Statement, p. 44) Yet, he invoked the hearing before the Board; went ahead with it after voir dire and after his objections were overruled; did not, at that point, raise the question of the validity of the statute.

II.

THE APPELLANT WAS NOT DENIED ANY RIGHTS BY REASON OF THE FAILURE OF RESPONDENT TO EMPLOY SPECIAL COUNSEL AS PROSECUTOR.

There was no "prosecutor" in this case. The record discloses, nowhere, any evidence that the *Board* acted in a dual role. What happened in this case is entirely consistent with the teachings of *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed.2d 287, 90 S.Ct. 1011 (1970); *Ferguson v. Thomas*, 430 F.2d 583 (Fifth Cir. 1970) and *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed.2d 811, 88 S.Ct. 1731 (1968).

On the issue of the dual role of the attorney for the Board, we agree that it is better to have a different attorney advise the Board during the hearing, but, in this case, we invite attention to the scrupulously fair behavior of the Board attorney as reflected by the record. Nothing similar to the *Miller* facts occurred, *Miller v. Board of Education*, 200 N.E. 2d 838, 51 Ill,

App.2d 20 (1964). *Mack v. Florida State Board of Dentistry*, 430 F.2d 862 (Fifth Cir. 1970), is not remotely in point. But, even there, the Fifth Circuit said, at page 864, that the hearing there was not a hearing, but an ungoverned confrontation. It suggested the employment of separate counsel but said: "We do not intimate that such a procedure is constitutionally required." None of the cases cited in the Jurisdictional Statement, p. 35, support the rule contended for in this case. All of the cited cases show highly objectionable conduct and obvious unfairness. There was no such conduct here.

To contrast the behavior of the Board's attorney in this case from those which Appellant has cited, we think it is appropriate to look at the several examples of the Board attorney's actions set out in the Jurisdictional Statement, commencing on page 36.

First, the Appellant says that the Board's attorney instructed the Board regarding voir dire, and cited Record, p. 15. Reference to the record shows that Mr. Blessey, Appellant's attorney, explained that he would like to voir dire the Board. Mr. Floyd, the Board's attorney, said:

> "You are sitting as a jury. The legal term, voir dire, means Mr. Blessey wants to ask you some questions concerning your knowledge and involvement with this particular case at this point, and I think it's proper procedure that you should submit to."

Mr. Blessey then proceeded to question the Board.

The second complaint is that he defended the Board's activities at previous meetings as described in the voir dire, citing Record, page 17. There Mr. Floyd is shown to have said:

> "To clarify, the meeting of the Board last Wednesday was to go over the procedure for this hearing tonight and to hear the reading of the formal charges. Will everybody say that's true?"

No objection was made by Mr. Blessey at that time.

His third complaint is that Mr. Floyd responded to objections to the proceedings entered by Mr. Blessey before the Board and advised the Board on how it should rule on the questions. This appears in Record, pages 19 and 20. At that ime, Mr. Floyd said:

> "We met here in this Board room a week ago, at which time Mr. Acker appeared with his counsel, who is a different counsel from the one I had been corresponding with before, at which time a lot of things were first requested of this School Board, and at which time immediately thereafter they were supplied. Under the new Mississippi law, being Senate Bill No. 2108, this information should be delivered to Mr. Acker and his counsel upon request. I don't feel that this body at this point can decide that the Mississippi law should be subjected to a ruling of a federal case, with which I am not familiar . . . I am going to look it up later. Therefore, I feel that all these objections and requests by counsel of Mr. Acker should be forsaken at this time and proceed with this hearing, and whatever merit is to any of them they can be brought up at a later date if necessary. So I would respectfully submit that this Board overrule his objections, that they be preserved for the record and lets continue with the hearing."

The record shows no further comment by Mr. Blessey.

The fourth complaint is that he called witnesses and examined them on direct examination on presenting the Principal's case against the teacher, citing Record, pages 20 to 50. A reference to this part of the record shows a simple inoffensive and dispassionate examination of the witnesses. It does not show any hostility, any discourtesy, or any unfairness in any way whatsoever.

The fifth objection is that the attorney advised the Board about taking a recess, citing Record, page 34. A reference to that page shows that the Board had raised the question about whether to proceed further into the evening. Evidently, two members wanted to vote on whether to extend the time, and the Board Chairman said: "If it's agreeable with the two attorneys, I will ask for a vote. " Mr. Floyd stated: "We are not going to object to that." And Mr. Blessey responded: "I am almost finished." Mr. Floyd then said: "We should finish with this witness. We can consider a recess after he is finished." Mr. Floyd further said: "We may wind up in half an hour to forty-five minutes." And Mr. Blessey commented: "I don't think we are that far from finishing." It is obvious that Mr. Floyd was cooperating with Mr. Blessey in an effort to permit him to continue. Certainly that was not unfair.

The sixth complaint is that Mr. Floyd has written a letter earlier, for the Board, giving the written reasons for nonrenewal, citing Record, pages 55 and 56. An examination of those pages of the record shows a letter from Mr. Floyd addressed to Mr. Acker dated May 24th, where Mr. Acker was advised that meeting date for the hearing had been reset for Monday, June 3rd, giving the time and place and containing this statement: "This setting meets the approval of your attorney, Mr. Gerald Blessey." Attached to the letter was the list of reasons why Mr. Acker was not recommended for reemployment. The letter concludes: "I am forwarding a copy of these reasons to Mr. Blessey along with a copy of this letter." We see nothing unfair or improper in the attorney for

the Board's having written this letter.

The seventh item complains that Mr. Floyd objected to a Motion to strike and says that he "allowed the Board to continue without ruling on the Motion." An examination of these pages shows that Mr. Acker had testified that he had earlier given a different reason for his use of the ladies' restroom than the one which he gave to the Board that night. Mr. Blessey moved to strike the questions and the answers regarding the earlier meeting on the ground that improper procedure was followed. Mr. Floyd stated: "I object to that being stricken . . . it's an admission by him . . . it doesn't have to be under oath, which he admitted to making." No one ruled upon Mr. Blessey's Motion and the record does not show that Mr. Blessey insisted or again requested a ruling. Certainly, it cannot be said that Mr. Floyd "allowed the Board" to continue without ruling on the Motion. There is an implication that Mr. Floyd was in charge, and the tenor of the whole record clearly shows that he was not.

The eighth objection is that Mr. Floyd advised the Board on how and when they could decide the case, citing Record, page 66. At that point, both sides had rested and the record shows that Mr. Blessey announced that Mr. Acker waived the requirement of decision within seven days and urged the Board to take more time to study the record. After closing statements, Mr. Barnes said: "We will wait until we receive the transcript." Mr. Floyd then said: "You can. You don't have to have it to make up your mind. You don't have to take it up in seven days either. Mr. Acker has waived the requirements." Again this was obviously in cooperation with Mr. Blessey to allow the Board to take such time as it needed to come to its decision. Certainly there was no unfairness shown here.

His ninth objection is that before the hearing, Mr. Floyd had participated in giving the Board advice on legal problems associated with the case and he cites a number of record pages.

None of them show the slightest impropriety or the slightest unfairness or prejudice to Mr. Acker in any way. It is true that earlier it was his opinion and the Board's opinion that they had no authority in the matter but, with the new statute, this was changed and immediately a fair and full hearing was afforded. The record is devoid of any indication of any evidence the Appellant sought to put on being declined, and it is wholly devoid of any overriding or overreaching on the part of counsel for the Board or of the Board itself, Counsel for Appellant proceeds to discuss ***Morgan v. United States***, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, 58 S. Ct. 999, (1937), discussing the delegation to the attorney for the prosecution of the task of preparing the decision. We are unable to understand the reason for the citation of that authority because there is no suggestion of such practice in this case.

As we have stated earlier, it would, perhaps, have been better to have someone else advise the Board during the hearing. If this had been done, however, it would have been more costly and counsel would still have raised the question of the fact that Mr. Floyd had probably discussed the matter with the Board earlier with respect to the procedures and he would have raised the same question. To escape the question entirely, two new lawyers would be required. We think that it should be kept in mind that the hearing before this School Board is not required to be a full blown trial, and that so long as the hearing is conducted honestly and fairly and the complaining employee is afforded a full opportunity to present matters which he feels will support his position, and as long as he is allowed a full opportunity to cross examine those who are brought in in opposition to him, and so long as he is not surprised with new charges which were not given him beforehand with a summary of the evidence which is expected to support them, then the requirements of due process in such cases have been met. We invite attention to the language of Appellant's counsel (R. 19) where it is stated:

> "I acknowledge for the record that Mr. Floyd has supplied me the names and the nature of the testimony of the witnesses in the past seven days, but this was too late to enable Mr. Acker to have a meaningful opportunity to confront these issues before an impartial tribunal."

An examination of the record and the testimony shows that there was no complexity about it, that the issues were simple and clear cut and that Mr. Acker did have and took full advantage of the opportunity to prepare his case.

III.

THE ALLEGATION THAT THE RESPONDENT BOARD WAS NOT AN IMPARTIAL DECISION MAKER IS WHOLLY WITHOUT SUPPORT IN THE RECORD.

On page 41 of the Jurisdictional Statement, the Appellant cites several cases where it is held that the hearing authority should be impartial. This is certainly not a novel proposition. There is nothing in this record, however, that supports his allegation that the Board was other than impartial in this case. A reference to the record, at pages 52 and 68, shows that the Board was at first under the impression that it did not have authority to enter into a contract with the teacher without the recommendation of the Principal and, therefore, considered a hearing useless. This was an erroneous conclusion but not a surprising one in view of the state of decisions at that point. As soon as the new law went into effect, however, the Board acted very promptly and very properly to afford the Appellant the hearing he requested. Appellant contends that, on voir dire, they admitted that they had discussed the case with the Superintendent and, possibly, the Board's attorney before the June 3rd meeting. A reference to record, pages 15 and 16, shows that

Mr. Barnes, President of the Board, stated that he did not recall discussing the facts of the case with anyone; had talked to no witnesses, had formed no opinion, and could judge it purely on the facts presented. He had not seen the letter stating the reason for Mr. Acker's non-renewal. He had talked some about it the week before after the case was continued. On page 16, Mr. Benvenuti said that he had not discussed the reasons for non-renewal until the meeting at which the case was postponed. He had seen the report in the paper but stated that he could judge the case impartially based on what he had heard at this hearing; that he had not talked with the Principal about it and talked only with the Superintendent at the last meeting when he heard the charges. Mr. Necaise said that he had first discussed the case at the last meeting when the hearing was postponed; did not see the newspaper story; had talked with no witnesses or anyone else; that he could sit impartially.

Mr. Stallings stated that he had first talked about the case, the week before, (when the hearing was postponed) and stated that he could sit and judge impartially in the matter. Mr. Harshburger stated substantially the same thing and he said that he could sit impartially. It was at this point that Mr. Floyd stated that the meeting of the Board mentioned was the one held to go over the procedure for the hearing and to hear the reading of the former charges. The Board members said that that was correct. (R. 17) Mr. Benvenuti said that they talked about the procedure and went home. On page 42 of the Jurisdictional Statement, Appellant makes reference to Record, pages, 68, 71, 73, and 74, and seems shocked by what is reflected in those minutes. He says that these minutes contradict each of the Board member's testimony. This statement simply is not true. A reference to those record pages shows nothing except the first conception of the Board that they could not hold a meeting and then reflects receipt of a charge of employment discrimination received from EEOC, showing that the matter should be referred to the attorney for study. They then

go on to show a determination that a hearing should be held, with a court reporter available and setting a date for the hearing. Obviously, Appellant is trying to torture the language of the Board on voir dire. Mr. Blessey asked the Board questions directed at whether or not they could sit impartially and they answered that they could. There is nothing whatsoever in the record to indicate that these statements were not made in the utmost good faith, nor is there anything to show that the Board behaved in anywise improperly, nor is there any evidence of bias prejudice or prejudgment. This is another illustration of the desperation of Appellant in his effort to make himself appear to have been mistreated when, in fact, he has received every fair consideration. Counsel says that the testimony of the Board strains one's credibility. We say in response that it is becoming increasingly difficult to persuade citizens to serve on Boards such as this. The job is a thankless one, certainly not remunerative, and no matter how hard the members strive to do their duty honestly and fairly, their motives are questioned and their integrity is impuned.

On page 43 of the Jurisdictional Statement, counsel seems to take offense at the fact that it was called to the Board's attention that Mr. Acker had given them a different impression at an earlier meeting as to his use of the ladies' restroom. This does not, in any way, indicate that the Board had made up its mind or had discussed the matter still, except as to the procedures, and although Mr. Acker may have made some statements to them at the time, it is certainly clear from the whole record that there was no general discussion to such a degree as to in anywise cause the Board to make up its mind beforehand. If there had been, certainly Mr. Acker's counsel would have brought it out at this hearing.

Counsel objects again, on pages 43 and 44 of the Jurisdictional Statement, that the Board failed to discuss objections and rule on a Motion by Acker's counsel. This happens

everyday in a thousand courts throughout the nation and it is the duty of counsel to insist upon the ruling on a Motion unless he waives it. Every lawyer is familiar, also, with the procedure in the courts everyday where an objection is made and the Court simply says "overruled" or "sustained" with no comment and no discussion. No inference can be drawn from this.

At page 44 of the Jurisdictional Statement, he speaks of the personal stakes by the Board and its attorney in the reasons for non-renewal and again cites Record instances (R. 55, 56, 68, 71, 73, 75, and, again 52). We confess that we are totally at a loss as we attempt to follow the reasoning of counsel for the Appellant at this point. All of the record pages cited simply show the consideration of the Board of the question of whether or not they could hold a hearing, and show the ultimate decision under the new statute they could, and show their prompt compliance with it. These discussions have nothing to do with the merits and they certainly do not show "lack of honesty in the Board" by not bringing these things up on voir dire. Much of the material shown on these record pages is actually favorable to Appellant or shows, at the very least, a strong desire to accord him every opportunity to make his defense. Again, we are wholly unable to follow counsel's reasoning in citing these instances as showing "the personal stakes" and the "personal bias" and the "prejudgment" of the Board, and we challenge and resent the language which says that these things show that the decision of the Board was "infected by bias and prejudgment not consistent with standards of honesty and integrity in due process . . .". Appellant's position on this point, as on the others, is all form with no substance.

IV.

THE RESPONDENT BOARD, FINDING NO REASON TO OVERRIDE THE DECISION OF THE PRINCIPAL NOT TO RECOMMEND RE-EMPLOYMENT, WAS NOT REQUIRED TO ARTICULATE THE REASONS FOR HIS DECISION. THE ISSUES NOT BEING COMPLEX AND THE REASONS BEING EVIDENT.

In this case, the duty rested upon the Appellant, at the hearing before the Board of Trustees, to show that the action of the Principal in failing to recommend a renewal of his contract was based upon impermissable reasons. ***Lamar County School Board v. Saul, supra; Calhoun County Board of Education v. Hamblin, supra.*** The issues were very simple and the facts were not complicated. Appellant, however, complained that the Board did not articulate the reasons which motivated it to decline to override the Principal's failure to recommend. He cites ***Goldberg v. Kelly, supra,*** on this point. It is true that the courts there stated that the decision maker should state the reason for his determination and indicate the evidence he relied on, though the statement need not amount to a full opinion or even formal findings of fact and conclusions of law. Appellant also cites ***Morrisey v. Brewer,*** 92 S.Ct. 2593, 33 L. Ed.2d 484, 408 U.S. 471 (1972). Appellant takes these opinions as prescribing an inflexible set of rules for administrative hearing.

In considering this point, we think that it should be remembered that, in ***Goldberg, supra,*** there was the question of terminating welfare payments to people otherwise destitute and in ***Morrissey, supra,*** there was the question of the revocation of parole and the reincarceration of the individual. In ***Morrisey, supra,*** however, the court said:

"It has been said so often by this court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands . . . its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." 92 S.Ct. at 2600.

At page 2604, the court says:

"We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any state's parole system."

In *Goldberg, supra*, there was, again, a very substantial and essential right involved, a more serious and essential right than in *Matthews v. Eldridge*, 96 S.Ct. 893, 424 U.S. 336 (1976) which involved the termination of social security disability payments. In *Goldberg, supra*, the court indicated that a hearing should be held before the payments were terminated and it said that the decision maker should state the reasons. The court does not say that, in every administrative hearing, due process is denied if the reasons are not stated in the decision. *Matthews, supra*, decided in 1976, discusses due process at some length and points out that the interest of the recipient of welfare disability payments are probably less pressing than the interest and needs of one who is receiving welfare. The court said, after discussing a number of its decisions:

"These decisions underscore the truism that ' " (d)ue process," unlike some legal rules, is not a technical conception with fixed content unrelated to time,

place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L. Ed.2d 1230 (1961). '(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L. Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected . . . " .

In this case, it should be observed that the Appellant has not, down to this very date, missed one day's work nor has he suffered any loss of pay whatsoever. He is being continued in his employment at this time under an agreement between counsel and the Board and was continued in his employment under a writ of supersedeas through the proceedings in the Supreme Court of the State of Mississippi. The process provided in the statute makes provision for judicial review to determine whether or not the action of the Board was supported by substantial evidence or whether it was based upon some impermissable ground, and the court has found that it was not. It is significant that this Jurisdictional Statement makes no allegation that the decision was on any impermissable ground but confines itself solely to an attack upon the procedures which were followed and the allegation that the Board was not impartial. We respectfully submit that in a situation where the issues are as clearly stated and are as simple and easy to understand and where they are so amply supported by the evidence and where the individual involved has not suffered any interruption of his employment, and where judicial review has been had through the trial court, and the Supreme Court of the State of Mississippi, the fact that the School Board failed to render a written opinion outlining the evidence and its reasoning does not render the procedure so defective in due process as to violate the rights of the individual.

We stated earlier that the money spent in this matter could have been better spent to increase teachers' salaries and to provide additional educational materials for the use of the schools. This is a legitimate concern and has some bearing upon the extent to which this state is required to go in employing additional attorneys and then providing more elaborate procedures. In ***Matthews,*** cited above, 96 S.Ct. 893, 909, the court said:

> "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to societies in terms of increased assurance that the action is just may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since the sources available for any particular program of social welfare are not unlimited. See ***Frindley, supra,*** 123 U.P.A. L.Rev. at 1276, 1303."

A great deal more is said in ***Matthews, supra,*** which is applicable to the present case.

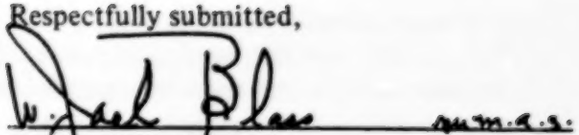
CONCLUSION

It is respectfully submitted that the record in this case, those portions cited by Appellant coming from the "abstract of record" filed with the Mississippi Supreme Court, clearly

and unequivocally refute the purported allegations of fact set out in the Jurisdictional Statement. This record reflects a scrupulous effort by the administrative body to be fair in every way. For the most part, the actions of the attorney for the Board at the hearing were actions taken in accord with and in conjunction with attorney for Appellant. Yet Appellant now complains of them. The record references to the actions of the Board do not show any prejudgment or bias but, on the contrary, show plainly and clearly, careful and scrupulous regard for the right of the Appellant. The record is so clearly contrary to the contentions made by Appellant that, but for high regard for Appellant's attorney, we would question his good faith and sincerity in lodging this appeal. As it is, we are constrained to believe that he is carried away by the spirit of advocacy and, for that reason, unable to glean from the record its clear and evident import.

The schools must be operated and someone on the scene must do it. If, in their honest effort to fairly perform their duties, the School Board fails to handle every case with the procedural wisdom of the highest courts, we respectfully suggest that they are entitled to some indulgence. This record shows that the Appellant has been afforded a hearing, postponed at his request, and that before the hearing, he was told what the charges were and he was informed as to the witnesses and their testimony. He was allowed to put on what proof he desired and was allowed to cross examine the witnesses and, indeed, to question the Board members themselves as to their qualifications. After being informed of the decision his case has been reviewed by the Chancery Court of Harrison County and by the Supreme Court of Mississippi to determine whether the decision of the Board was supported by the evidence, whether it was arbitrary or capricious, whether any statutory or constitutional right of the Appellant had been violated. We submit that he has had due process of law and that this appeal should be dismissed as an appeal and, if considered as a petition for a writ of certiorari, it should be denied.

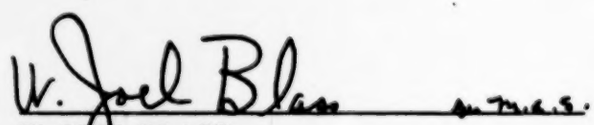
Respectfully submitted,



W. JOEL BLASS
Attorney for Appellee
Mize, Thompson & Blass
Post Office Box 160
Gulfport, Mississippi 39501

CERTIFICATE OF SERVICE
PER RULE 33(3)(b) OF THE
SUPREME COURT OF THE UNITED STATES

I, W. Joel Blass, attorney for the Appellee herein, and a member of the Bar of the Supreme Court of the United States. hereby certify that, on the 9th day of October, 1978, I served copy of the foregoing Motion of Appellee to Dismiss Appeal by service on Honorable Gerald Blessey and Honorable Paul Minor, attorneys for the Appellant, by mailing a copy to them in a duly addressed envelope with first class postage prepaid to their address at Post Office Drawer L, Biloxi, Mississippi 39533.



W. JOEL BLASS
Attorney for Appellee

SCOFIELD PRINTING CO., INC.

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New Orleans, La. 70184
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